No. 90-222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BEVERLY ANN COOK, CLAUD RICHARD DOTY, WENDELL L. SMITH, JR., and LINDA SMITH WEST,

Petitioners,

vs.

ARAMINTA MCCULLOUGH; C & N LEASING and RENTAL CO., INC.; JIM ED CLARY, Property Assessor of the Metropolitan Government; BILL GARRETT, Trustee of Davidson County; and MULTIMEDIA, INC. d/b/a *THE NASHVILLE RECORD,*

Respondents.

On Petition for a Writ of Certiorari to the Tennessee Court of Appeals

BRIEF OF RESPONDENTS JIM ED CLARY AND BILL GARRETT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES L. MURPHY, III
(Counsel of Record)
METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY
204 Metropolitan Courthouse
Nashville, Tennessee 37201
(615) 862-6341

Attorney for Respondents, Jim Ed Clary and Bill Garrett

St. Louis Law Printing Co., Inc., 13307 Manchester Road 63131 314-231-4477

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Summary Statement of Respondents' Position	1
Argument	3
Conclusion	9

TABLE OF AUTHORITIES

	Page
Cases:	
Bender v. City of Rochester, 765 F.2d 7 (2d Cir. 1985) ..	6
Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1056)	4
Davis Oil Company v. Mills, 873 F.2d 774 (5th Cir. 1989), *cert. denied,* ____ U.S. ____, 110 S.Ct. 331, 107 L.Ed.2d 321 (1989)	7
Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983)	7
Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983)	4-6,8
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).....	3-6,8
Nelson v. City of New York, 352 U.S. 103, 77 S.Ct. 195, 1 L.Ed.2d 171 (1956).....	4
Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed. 255 (1962).....	4
Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988)	5
Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed. 178 (1956).....	4
Constitutional Provisions and Statutes:	
Tennessee Code Annotated §67-2018	2,6,8

No. 90-222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BEVERLY ANN COOK, CLAUD RICHARD DOTY, WENDELL L. SMITH, JR., and LINDA SMITH WEST,

Petitioners,

vs.

ARAMINTA MCCULLOUGH; C & N LEASING and RENTAL CO., INC.; JIM ED CLARY, Property Assessor of the Metropolitan Government; BILL GARRETT, Trustee of Davidson County; and MULTIMEDIA, INC. d/b/a *THE NASHVILLE RECORD,*

Respondents.

On Petition for a Writ of Certiorari to the Tennessee Court of Appeals

BRIEF OF RESPONDENTS JIM ED CLARY AND BILL GARRETT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SUMMARY STATEMENT OF RESPONDENTS' POSITION

Respondents Jim Ed Clary, Property Assessor of The Metropolitan Government of Nashville and Davidson County, and Bill Garrett, Trustee of Davidson County, respectfully insist that this Court should deny the petition for a writ of certiorari on the grounds that the decisions of the courts of Ten-

nessee in this case are not in conflict with prior decisions of this Court.

Petitioners have failed to establish a conflict between the prior decisions of this Court and the decisions of the courts of Tennessee in this case because the preceding decisions of this Court are factually distinguishable from the instant case. Petitioners claim that as a result of the operation of Tennessee Code Annotated §67-2018 they were denied due process in that they were not provided with actual notice of the pendency of an action to sell their properties to satisfy tax liens and were not provided notice of the sale of their properties. These claims are based on the totally erroneous assumption that their names and addresses were readily ascertainable by Respondents Jim Ed Clary and Bill Garrett. To fully and finally ascertain that Petitioners' claims are without merit the prior decisions of this Court will be distinguished from the case at bar. Moreover, recent case law will be presented which distinguishes and limits the holdings of decisions of this Court considered by Petitioners to be very persuasive.

ARGUMENT

In this case, Petitioners have failed to prove that their interests in the properties in question were known by Respondents Clary and Garrett. Petitioners correctly state that the leading case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) held that due process requires a form of notice reasonably calculated under the circumstances to apprise the holder of a legally protected property interest of the pendency of the action and that notice by publication is insufficient where the identity and location of the property owner were known. Petitioners further state that in the latter instance, actual notice was required while notice by publication was permissible for unknown owners. Petitioners, however, neglect to cite the portion of the *Mullane* decision which indicates "that there is no formula which can be used to determine when actual or constructive notice must be utilized. This determination of necessity must be made on a case by case basis". *Id.* 339 U.S. at 314, 70 S.Ct. at 657, 94 L.Ed. at 873. This Court's failure to set forth a formula to determine when actual or constructive notice must be utilized is damaging to Petitioners' allegation that *Mullane* is applicable to the facts underlying their claims. It is plain that the notice due will, of necessity, turn on the facts of each case. In *Mullane* the state actually knew the identity of the party seeking notice and the statutory provision for notice to trust beneficiaries was only subject to due process objections and held to be unconstitutional as regards those beneficiaries whose addresses and specific interests were known. These beneficiaries were held to be entitled to actual notice. *Id.* 339 U.S. at 318, 70 S.Ct. at 659, 94 L.Ed. at 875.

Absent knowledge of the Petitioners' interests or whereabouts, they were only entitled to notice by publication in the name of John S. Edney, the decedent through which they claim an interest in the properties in question. Since actual service of process on Mr. Edney was not possible, constructive service by

publication was the best method available to apprise the owners of the properties of the pending actions to sell the properties for delinquent taxes.

Respondents Clary and Garrett agree that where the names and addresses can be ascertained from local land records, there are no compelling or persuasive reasons why actual notice cannot be given to property owners regarding an impending tax sale. Petitioners contend that *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956), *Nelson v. City of New York*, 352 U.S. 103, 77 S.Ct. 195, 1 L.Ed.2d 171 (1956), *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956), and *Schroeder v. New York City*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), support their position that they were entitled to actual notice of the tax sale whereby their properties were sold. In all of the foregoing cases state officials either knew the identities of the property owners or the identities of the property owners were very easily ascertainable by referring to local land records. Petitioners' names and addresses, however, could not be ascertained from local land records, and as a result they were not entitled to actual notice of the tax sale. Also, in *Walker* this Court reiterated the holding in *Mullane* by stating that in some cases it might not be reasonably possible to give personal notice, for example, where people are missing or unknown. *Walker v. City of Hutchinson*, 352 U.S. at 115-116, 77 S.Ct. at 202, 1 L.Ed.2d at 182. Therefore, because Petitioners' names and addresses were not readily ascertainable from local land records, Petitioners were only entitled to constructive notice which was the best notice possible under the circumstances.

Petitioners' names and addresses were not of record in the land records for Davidson County and, contrary to this Court's finding in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), were not reasonably ascertainable by Respondents Jim Ed Clary and Bill Garrett through reasonably diligent efforts. Petitioners contend that

Mennonite is persuasive in that it reaffirmed that the principles discussed in *Mullane* were generally applicable to proceedings to sell property for delinquent taxes or to foreclose statutory property tax liens. In *Mennonite*, the property owner had received actual notice of the tax sale, however, the mortgagee had only received notice by publication. This Court held that before the state conducts any proceeding that will affect the legally protected property interest of any party, the state must provide notice to that party by means reasonably calculated to ensure actual notice as long as the party's identity and location are reasonably ascertainable. *Id.* 462 U.S. at 800, 103 S.Ct. at 2712, 77 L.Ed.2d at 188. *Mennonite* broadened the scope of the individuals and interests that are entitled to actual notice to satisfy due process requirements. However, *Mennonite* specifically maintained the limitation set forth in *Mullane* which requires that the individual must be reasonably ascertainable before due process will require actual notice. The mortgagee in *Mennonite* was reasonably ascertainable because it was identified in a mortgage that was publicly recorded in the land records. *Mennonite* only requires the county officials to make "reasonably diligent efforts" to uncover the identities of real property owners. *Id.* 462 U.S. at 798, 103 S.Ct. at 2711, 77 L.Ed.2d at 187.

Petitioners' arguments conflict with the holding in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), since Petitioners seek to require Respondents Clary and Garrett to conduct impracticable and extended searches in the name of due process. In *Pope*, this Court simply reiterated the holding of *Mennonite* that an individual had to be known or reasonably ascertainable before actual notice would be required. This Court acknowledged that the *Mullane* line of cases does not "require impracticable and extended searches in the name of due process." *Id.* 485 U.S. at 490, 108 S.Ct. at 1347, 99 L.Ed.2d at 578, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 317-318, 70 S.Ct. at 659, 94 L.Ed. at 875.

Respondents rely upon *Bender v. City of Rochester,* 765 F.2d 7 (2d Cir. 1985), in support of the contention that a search of probate records is unreasonable to determine Petitioners' interests and addresses. In *Bender*, an administrator brought suit challenging the city's foreclosure of its tax lien and its subsequent sale of a parcel of real property. The Second Circuit held that the city satisfied the requirements of due process by mailing notice to persons indicated on land records as owners. The court found that "though the burden of inspecting records of the surrogate's court is not heavy, it is a task beyond the routine examination of land records that was involved in *Mennonite*". *Id.* 765 F.2d at 11. The court held that the names of the distributees of the probate estate were not reasonably ascertainable for purposes of applying *Mennonite*. *Id.* 765 F.2d at 12.

It is important to note that *Bender* contained facts that were nearly identical to those underlying Petitioners' claims. Although *Bender* was not appealed to this Court, the Second Circuit's decision was based upon the premier due process cases of *Mullane* and *Mennonite*. *Bender* affirms that Petitioners' assumption that their interests were reasonably ascertainable is without any basis in fact or law.

Tenn. Code Ann. §67-2018 is constitutional where it provides that those whose names are not reasonably ascertainable and who desire actual notice must comply with the registration requirements of the statute. This statute provides that the notice of a tax sale shall be sent to the last known address of the present owner and that it is the responsibility of the property owner to register his/her name and address with the tax assessor. Petitioners claim that this statutory provision denies them due process because it conditions their constitutional right to notice on registering their names with the tax assessor. Other federal cases dealing with this issue have held that where the names of property owners are not reasonably ascertainable actual notice may be conditioned upon a similar registration requirement.

Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983); *Davis Oil Company v. Mills*, 873 F.2d 774 (5th Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 331, 107 L.Ed.2d 321 (1989). *Davis Oil Company* supports Respondents' contention that actual notice was not required to be given to Petitioners. In *Davis Oil*, the Fifth Circuit Court held that constructive notice to a junior mineral lessee, whose lease would be extinguished under Louisiana law by a foreclosing mortgagee, was sufficient. *Id.* 873 F.2d at 791. The court reasoned that the junior lessee had failed to avail himself of Louisiana's request notice statute and searching of conveyance records to identify parties with mineral interests would have been unduly burdensome. *Id.* 873 F.2d at 789. Likewise, actual notice was not required to be given to Petitioners and constructive notice was sufficient as Petitioners had failed to register their names and addresses with the tax assessor and searching probate records would have been unduly burdensome.

The pertinent statute at issue in *Davis Oil* contained a request notice provision which set forth that any person may obtain notice by mail of the seizure of property by paying a specific fee and placing his name and address on file in the mortgage records of the parish where the property was located. The Fifth Circuit Court stated that "in the instant case, we evaluate the burden of requiring a seizing creditor to wind its way through a potentially complex maze of leases and assignments in order to identify interested parties, together with the relatively simple means available, under RS: 13:3886, to ensure receipt of notice. We conclude that under the circumstances 'reasonable diligence' did not require that FNB search the conveyance records to ascertain the identities of mineral leases". *Id.* 873 F.2d at 790.

It is evident that the court in *Davis Oil* balanced the effort required by the state to ascertain the lessee's interest against the effort necessary for the lessee to request notice. The statute was not violative of due process where compliance with its re-

quirements was "simple" and searching conveyance records was "unduly burdensome". Constructive notice was deemed to be adequate in this instance and the statute was upheld. Respondents do not contend that Tenn. Code Ann. §67-2018 serves as the sole determinant of those property owners entitled to notice, but that registration is necessary for those property owners desiring actual notice whose names are not reasonably ascertainable.

A request notice statute such as Tenn. Code Ann. §67-2018 is constitutional where it provides that those whose names are not reasonably ascertainable and who desire actual notice must comply with the registration requirements of the statute. Petitioners' interests were not reasonably ascertainable by Respondents Jim Ed Clary and Bill Garrett without an extensive and impracticable search. Therefore, in the instant case, since Petitioners did not comply with Tenn. Code Ann. §67-2018, they were not entitled to actual notice but only constructive notice in the name of Mr. Edney as this was the best possible notice under the circumstances. The foregoing analysis indicates that the decisions of the Tennessee courts at issue do not conflict with prior decisions of this Court and that these decisions are entirely consistent with *Mullane*, *Mennonite*, and other decisions of this Court which have thoroughly resolved the issue at hand. Therefore, there is no basis for review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES L. MURPHY, III
(Counsel of Record)
METROPOLITAN GOVERNMENT
OF NASHVILLE AND DAVIDSON
COUNTY
204 Metropolitan Courthouse
Nashville, Tennessee 37201
(615) 862-6341

Attorney for Respondents
Jim Ed Clary & Bill Garrett